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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. RAYMOND MICHAEL OUBICHON, Defendant and Appellant.	C058670 (Super. Ct. Nos. 06F08876, 06F11130)

Defendant, Raymond Michael Oubichon, was charged in two separate cases, No. 06F11130 and No. 06F08876, which were calendared together and assigned for trial to the same judge. Although the cases were separate and charged different offenses, they both alleged the same 2005 residential burglary conviction as a strike prior. Case No. 06F11130 was tried first; the jury found defendant guilty of the three gun offenses and he admitted the 2005 residential burglary conviction as a strike prior. Case No. 06F08876 charged defendant with one count of residential burglary of an apartment and alleged the same strike

prior, the 2005 residential burglary conviction. The jury convicted defendant of the offense and he waived his right to jury trial on the strike prior. A court trial on the strike prior was set on the date of judgment and sentence.

On appeal, defendant contends: in case No. 06F08876 that (1) there is insufficient evidence of his identity as the perpetrator to support the burglary conviction, and (2) the trial court erred by sentencing him under the Three Strikes law without expressly finding that he suffered the prior felony strike conviction.

Neither contention has merit. We shall affirm the judgment.

BACKGROUND

Case No. 06F11130

After hearing evidence that defendant was waving a gun in a shopping center parking lot, a jury convicted him in November 2007 of gun offenses including possessing a firearm as a felon and possessing a loaded firearm in a public place. In that proceeding, defendant admitted outside the presence of the jury that he had suffered a prior conviction for first degree burglary--a "strike" conviction--in 2005.

Case No. 06F08876

In this case, defendant was charged with first degree burglary of an apartment. In view of the contentions on appeal, we consider in detail the evidence from which the jury concluded that defendant was one of the perpetrators.

The lone witness, Cherie Lewis, lived in an apartment in Sacramento, and was home at noon when she heard a loud knock coming from the apartment next door. She looked through the peephole in her door and saw two men outside her neighbor's apartment: one with a medium to dark complexion, whom she identified as a Black man, and one with a lighter complexion, who she thought was a "[W]hite guy." At trial, Lewis recalled that one man was wearing a blue shirt, and the other a white shirt, but she could not remember which man was wearing which shirt. The lighter-complected man was wearing a hat or something on his head, so she could not see his hair, but "just saw his face." As she watched, the two men left.

Moments later, Lewis heard a noise at her neighbor's door, like "someone had jiggled--had pushed the door open and it wasn't a knock." Looking through the peephole, she saw a man enter her neighbor's apartment. Lewis knew her neighbor was out of town for the weekend, so she called 911.

She continued to watch through the peephole, and saw two men emerge; one was carrying a little black bag or case. She saw their faces, and recognized them as the same two men whom she had first seen standing together outside the neighbor's door. The man holding the bag set it down for a second to "mess[] with the door," and Lewis had a second opportunity to look at him. At trial, Lewis could not remember which of the two men was carrying the bag.

Fearful that her apartment might also be a target, Lewis waited a few minutes and then decided to leave in her car.

Outside the apartment, she saw a sheriff's car and directed the deputy "towards the back of the apartment complex" where she thought the two men had gone; however, Lewis then encountered them on the walkway back to her apartment. She later testified she "was sure" they were the same men she had seen through the peephole. Frightened, Lewis dropped her backpack, picked it up, and started walking in another direction. The two men also reversed course. Lewis retreated to another neighbor's apartment and called 911 again.

One deputy detained a Black man identified as Christopher Walker; when deputies patted him down, they found he had a white sock in each of his front pants pockets, in addition to the socks on his feet. Another deputy noticed a flash of white that she took to be someone running; she passed through an opening in a fence behind the apartment complex and saw only defendant in the adjacent field, wearing a blue shirt and a white "do-rag" on his head. Questioned by the deputy, defendant admitted he knew Walker, but denied having been with him that day, denied having been at the burglarized apartment, and denied involvement in the break-in. Defendant said he had just been walking through the apartment complex to smoke a "blunt," and that he had been behind the complex for 10 or 15 minutes, but he had no marijuana or smoking paraphernalia with him and did not smell of marijuana.

At the scene, Lewis identified defendant and Walker as the two men she saw through the peephole when she first heard the knock on the neighbor's door as the same two men she saw back at

the door a few moments later, and the same two men who frightened her when she met them on the walkway near her apartment. She was "fairly certain," or "a hundred percent" certain of her identification.[1]

After defendant was placed in the back seat of the patrol car, officers found a stray white sock on the floor; a second, nonmatching white sock was found in his pants pocket. Both were in addition to the socks on his feet.

An officer testified at trial that she had been told by a burglary detective it is "a common practice" for burglars to either bring socks with them or take socks from the scene to use to mask their fingerprints or to later wipe down any areas they might have touched.

The victim later testified a black camera bag had been stolen from her apartment.

Defendant was charged with first degree burglary, and it was alleged he had previously suffered a June 2005 conviction for burglary. Trial on the prior conviction was bifurcated.

At trial, Lewis identified defendant as one of the men she identified to the officers in connection with the burglary.

The defense was mistaken identification. Defendant focused on Lewis's admission at trial that when she saw the White man through the peephole, she felt she had gotten the "gist" of him, although she was only able to get "a little bit" of a look at

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[1] Defendant was the lighter-skinned man that Lewis initially believed was White.

his face through the peephole, and had previously told deputies her view of the White man "wasn't very clear because of the peephole[.]" She estimated that the men she saw through the peephole were 5 feet 10 inches tall or taller; defendant is 5 feet 5 inches tall. An officer conducting the field showup testified he had a vague recollection that Lewis had indicated some confusion about whether defendant had changed his shirt after she had seen him through the door.

The jury found defendant guilty of the burglary. Additional facts relevant to sentencing appear in part II of the Discussion, *post*.

DISCUSSION

I.

Defendant claims there was insufficient evidence of his identity to support his burglary conviction, such that "a reasonable trier of fact could not have found [him] guilty of burglary." We disagree.

Burglary involves the act of unlawful entry accompanied by the specific intent to commit grand or petit larceny or any felony. (§ 459; *People v. Montoya* (1994) 7 Cal.4th 1027, 1041.)

In reviewing a challenge to the sufficiency of the evidence, we apply the following standard of review: "[We] consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable

doubt." (*People v. Mincey* (1992) 2 Cal.4th 408, 432, fn. omitted; see *People v. Carter* (2005) 36 Cal.4th 1114, 1156; *People v. Hayes* (1990) 52 Cal.3d 577, 631.)

The standard of review is the same in cases where, as here, the prosecution relies primarily on circumstantial evidence. (*People v. Valdez* (2004) 32 Cal.4th 73, 104; *People v. Rodriguez* (1999) 20 Cal.4th 1, 11; see *People v. Matson* (1974) 13 Cal.3d 35, 41.) Our sole function is to determine if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319 [61 L.Ed.2d 560, 573-574]; *People v. Bolin* (1998) 18 Cal.4th 297, 331.) The California Supreme Court has held "[r]eversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*Bolin, supra*, at p. 331, quoting *People v. Redmond* (1969) 71 Cal.2d 745, 755.)

In reviewing the sufficiency of eyewitness testimony, the following standards apply: "It is well settled that, absent physical impossibility or inherent improbability, the testimony of a single eyewitness is sufficient to support a criminal conviction. [Citation.] '"To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [Citations.] Conflicts and even testimony which is subject to justifiable suspicion do

not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.]"' [Citations.]" (*People v. Allen* (1985) 165 Cal.App.3d 616, 623.) "Identity is a question of fact for the trial court [citations] and any claimed weakness in the identification testimony is a matter of argument to the court below and cannot be effectively urged on appeal." (*People v. Hinson* (1969) 269 Cal.App.2d 573, 578.)

Lewis testified she looked through the peephole of her apartment door and saw two men standing outside her neighbor's door. The lighter-complected of the two had something on his head, so she could not see his hair, but "just saw his face" and "got the gist of what he looked like." When she heard the neighbor's door give way a few minutes later, she looked through the peephole again and saw one of the men (not defendant) enter the apartment; as she watched, two men emerged from the neighbor's apartment, and Lewis recognized them as the same two men she had seen standing outside the neighbor's door moments before. Later, when she encountered them on the apartment walkway, she "was sure" they were the same two men she had seen through the peephole. At the scene, Lewis identified both defendant and Walker as the men she had seen at her neighbor's door, and told officers she was "a hundred percent certain" of her identification of defendant. Her testimony provided substantial evidence of defendant's participation in the burglary.

Defendant's criticisms of Lewis's trial testimony--that she did not provide a description of him to the 911 operator and that she did not see him well enough through the peephole to identify him--do not undermine it on appeal. Weaknesses and inconsistencies in eyewitness testimony are matters solely for the jury to evaluate (*People v. Allen*, *supra*, 165 Cal.App.3d at p. 623), and inaccurate descriptions of a defendant do not necessarily undercut the sufficiency of an identification. (*People v. Marquez* (2000) 78 Cal.App.4th 1302, 1305-1307.) That the jury was convinced by Lewis's identification does not render it unreasonable, as defendant argues.

There were additional incriminating facts in the chain of circumstantial evidence connecting defendant to the crime. A deputy's attention was drawn to a flash of white that she thought was someone running outside the apartment complex just minutes after Lewis reported the burglary. When she followed what she had seen, she found defendant alone in a field. He told officers he was there to smoke a "blunt," but he had no lighter, smoking paraphernalia or marijuana. He also admitted he knew the other man identified by Lewis. In addition, both men were carrying extra socks in their pants pockets, which the jury was told burglars commonly use to avoid leaving fingerprints. (See *People v. Southard* (2007) 152 Cal.App.4th 1079, 1088-1089 [the possession of items "commonly used by burglars to facilitate a burglary" can constitute evidence of the requisite felonious intent, even if they are not within the statutory definition of burglary tools].)

That the items stolen from Lewis's neighbor were never recovered and linked to defendant is not fatal to his identification as one of the burglars, as defendant suggests on appeal. (§ 459; cf. *People v. Murphy* (1959) 173 Cal.App.2d 367, 373 [the statute does not require either that the stolen property be found in the possession of the defendant, or that a theft actually occurred; it "requires evidence only that the entry be effected with the intent to steal or to commit any felony"].)

No reversal of the conviction is required.

II.

At sentencing, the court selected the upper term of six years for burglary, and then doubled it to 12 years under the second strike provisions of the Three Strikes law. (§§ 667, subd. (e)(1), 1170.12, subd. (c)(1).) Defendant contends the trial court erred in sentencing him under the Three Strikes law without making an express finding that he suffered a prior felony strike conviction for burglary. (§ 1158 ["Whenever the fact of a previous conviction of another offense is charged in an accusatory pleading, and the defendant is found guilty of the offense with which he is charged, . . . the judge if a jury trial is waived, must unless the answer of the defendant admits such previous conviction, find whether or not he has suffered such previous conviction"]; *People v. Eppinger* (1895) 109 Cal. 294, 297-298 [failure to find on issue of prior conviction treated as acquittal].)

We disagree with defendant. The record indicates that the trial court impliedly found that the prior felony conviction constituted a strike, and thereafter sentenced him applying strike sentencing rules.

After the jury rendered its verdict on the burglary charge, defendant waived his right to jury trial on the prior strike allegation. Thereafter, the following exchange was had regarding preparation of the probation report prior to sentencing:

"THE COURT: [A]nd in terms of the referral to probation, in terms of the preparation of the report, are the parties satisfied to have it referred as if the prior strike is true?

"It was found true in the other case [case No. 06F11130] based on the admission. And that way the Court can just look at the report in that fashion.

"And then if the decision is otherwise, any adjustment or modification can be made.

"[DEFENSE COUNSEL]: That's fine.

"THE COURT: All right. So the referral to probation, the matters, both cases will be referred to probation for a presentence investigation and report.

"And the report will be prepared in this case as if the prior strike is true but understanding that obviously the Court still needs to review the evidence and make a determination at a court trial to be heard at the date and time of the judgment and sentence to determine if, in fact, it is true.

"And the People will come prepared to submit documents in terms of proof. The defense will be prepared to submit any documents you feel on the issue of the proof of the prior at the time of judgment and sentence.

"[DEFENSE COUNSEL]: Yes.

"[THE PROSECUTOR]: In fact, the People will submit the documents prior to that date so the Court has plenty of time to look at them and review them.

"THE COURT: That would be helpful, with notice to [defense counsel].

"I assume they have already been discovered, but what documents are being submitted. And, [defense counsel], you agree that he can submit them in that fashion for consideration?

"[DEFENSE COUNSEL]: Yes, your Honor.

"THE COURT: All right. And, of course, [defense counsel], if you have any documentation you wish to submit, can likewise do so."

Judgment and sentencing was twice continued.

On the appointed date for judgment and sentencing, there was no further discussion of a court trial on the truth of defendant's prior conviction. In announcing judgment on defendant's burglary conviction, the court noted that defendant is "being sentenced under the strike law sentencing scheme" and mentioned defendant's prior first degree burglary conviction.

It then declared the sentence "as follows: There are several cases, so just to be clear, as to Case [No.] 06F08876, it is the judgment and sentence of this Court that the defendant

be imprisoned in the state prison for the upper term, and that is a term of twelve years.

"The upper term is selected based on the factors in aggravation which I have deemed substantially outweigh those in mitigation in this matter. He is being sentenced under the strike law, so the standard term is doubled."

After sentencing defendant in case No. 06F11130, the court then said: "You know, counsel, I'm gonna restate one matter: Rather than sentence this consecutive for the burglary, I'm simply going to terminate state prison, I'm going to indicate [*sic*] him to state prison, but order that run concurrent to the time.

"He's got most of his time served on that, but I do believe that's fair in light of the fact that that prior is being used and is calculated into the sentence in view of strike law sentencing. And I hadn't specifically addressed that previously, but I do so at this time.

"Twelve years, plus one year and four months, so that's thirteen years and four months."

Defendant contends that his sentence on the burglary conviction in case No. 06F08876 must be vacated because, although the prior strike allegation "was never adjudicated, [he] was sentenced as if it had been found true."

This contention is without merit, as it rests on the premise that the trial court's failure to make an express finding constitutes a "silent" record, which operates as a finding that the special allegation is not true. For example,

in *In re Candelario* (1970) 3 Cal.3d 702, the trial court attempted to amend the judgment to include reference to a prior conviction that the defendant admitted but that was not mentioned when judgment was pronounced. In concluding that the attempted modification was not permitted, the Supreme Court said: "Reference to the prior conviction must be included in the pronouncement of judgment for if the record is silent in that regard, in the absence of evidence to the contrary, it may be inferred that the omission was an act of leniency by the trial court. In such circumstances the silence operates as a finding that the prior conviction was not true. [Citation.]" (*Id.* at p. 706, fn. omitted; see also *People v. Mesa* (1975) 14 Cal.3d 466, 470-472.)

But the court has deemed the record not "silent" when--as here--the oral pronouncement of judgment "speaks" to impliedly affirm the truth of the use of a firearm allegation. (*People v. Clair* (1992) 2 Cal.4th 629, 691; *People v. Chambers* (2002) 104 Cal.App.4th 1047, 1050-1051.) Thus, in *Clair*, the defendant was charged with murder and two counts of burglary. The information alleged that he had been previously convicted of a serious felony. The murder and burglary charges were tried to a jury, which returned guilty verdicts. The defendant waived a jury on the prior serious felony allegation and consented to trial by the court. The trial court did not expressly find that the prior allegation was true, but it imposed a five-year prison term for the prior serious felony conviction. Our Supreme Court rejected the contention "that the sentence on the serious-felony

enhancement must be set aside because no finding on the underlying prior-conviction allegation appears." (*Clair, supra,* at p. 691, fn. 17.) It reasoned: "At sentencing, the court impliedly--but sufficiently--rendered a finding of true as to the allegation when it imposed an enhancement *expressly* for the underlying prior conviction." (*Ibid.*; see also *Chambers, supra,* at pp. 1050-1051 [trial court impliedly and sufficiently rendered true finding regarding firearm use allegation when it imposed a 10-year enhancement therefor].)

This is not a case where the trial court's silence implies an act of leniency. (Cf. *In re Candelario, supra,* 3 Cal.3d at p. 706.) Rather, the trial court here imposed sentence based upon the strike sentencing rules. There is no miscarriage of justice and a remand for an express finding would be an exaltation of form over substance.

DISPOSITION

The judgment is affirmed.

CANTIL-SAKAUYE, J.

We concur:

SIMS, Acting P. J.

RAYE, J.